SUPREME COURT, U. S.

FILED

SEP 7 1973

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-300

ELLIOT L. RICHARDSON, Attorney General, *et al.*,
Petitioners,

vs.

ROBERT BUSTOS, *et al.*,

AMICUS CURIAE BRIEF.

RONALD H. BONAPARTE,
LEON L. GORDON,
WILLIAM S. MARRS,
MILTON C. GELBMAN,
1776 "K" Street, N.W.,
Washington, D.C. 20006,
Amici Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 794-0822

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Interest of Amicus Curiae.

The California Farm Bureau Federation is a nonprofit corporation organized under the laws of the State of California. It presently has approximately 62,000 members consisting primarily of farmers and others interested in farm problems in California. The American Farm Bureau Federation is a general farm organization with more than 2,000,000 member families who belong to state farm bureaus in 49 states and Puerto Rico. It is a voluntary, nonprofit corporation, organized under the laws of the State of Illinois. The National Council of Agricultural Employers is a nonprofit corporation organized in the District of Columbia, composed of members who are agricultural employers in 46 states.

This *amicus* brief is being filed because the decision of the Court of Appeals of the District of Colum-

bia would have a devastating impact on the agricultural economy of California, as well as other states along the Mexican and Canadian borders.

In California there are approximately 210,000 people employed in agriculture. Within this work force, approximately 150,000 are lawful permanent residents whose families have homes in Mexico and who would be affected adversely by the decision in the instant case. (See Appendix I.) If available, statistics from the States of New Mexico, Arizona and Texas would be similar.

The reason for the adverse effect lies in the potential impact the instant case would have on the long established policy of the Immigration and Naturalization Service ("Service") in admitting for entry to the United States any lawful permanent resident alien upon showing of an Alien Registration Receipt Card (Form I-151) pursuant to the provisions of 8 U.S.C. 1181(b) and the regulations at 8 C.F.R. 211.1(b)(1). This policy has allowed agricultural workers who are lawful permanent residents to be employed in the United States and have their families remain in Mexico and Canada for economic reasons. Such workers would commute across the border either daily or seasonally depending upon the distances between the places of employment and the border.

The decision of the Court of Appeals in the instant case destroyed this policy. The effect of that decision was to create two classes of aliens lawfully admitted for permanent residence. The first was the class of aliens who work in and whose families reside in the United States. The second was the class of aliens who work in the United States but whose families live either

in Mexico or Canada. The latter class of aliens were called "commuters" and it, in turn, was divided into two subcategories:

1. Aliens who commute daily between their employment in the United States and the homes of their families in Mexico or Canada;

2. Aliens who work in the United States, but visit their families in Mexico or Canada only seasonally.

After making this distinction, the Court held that petitioner Service should discriminate between lawful permanent resident aliens in enforcing the Immigration Act according to this classification system. Specifically, it held that the informal documentary waiver provisions of 8 U.S.C. 1181(b) and 8 C.F.R. 211.1(b)(1) relating to entry into the United States should be denied to seasonal commuter aliens. It also sustained indirectly the right of the Service to enact and enforce discriminatory regulations against commuter aliens such as the so-called labor dispute regulations, *i.e.*, the last sentence of 8 C.F.R. 211.1(b)(1) referred to in Appendix D in the stipulation between petitioners and respondents. (pp. 34-36 of the Petition for Writ of Certiorari.)

The interest of the California Farm Bureau Federation, the American Farm Bureau Federation, and the National Council of Agricultural Employers, in this matter is clear. The classification system used by the Court of Appeals in the instant case and supported by respondent places the majority of workers in California agriculture in the most adversely affected subclass, *i.e.*, the seasonal commuter. American Farm Bureau Federation and the National Council of Agricultural Employers believe the same adverse effect will be found in the other states along the Mexican and Canadian

borders. It is the seasonal commuter alien who cannot take advantage of the informal documentary waiver provisions of 8 U.S.C. 1181(b) and 8 C.F.R. 211.1(b)(1). This discriminatory policy would result in the loss of employment for these aliens and in the further loss to the California agricultural community of the services of these affected aliens.

REASONS FOR GRANTING THE WRIT.

I.

A conflict exists between the Courts of Appeals for the District of Columbia and the Ninth Circuit. The clash centers about the decision in the instant case and two Ninth Circuit decisions, *Gooch v. Clark,* 433 F.2d 74 (9th Cir. 1970), cert. denied, 402 U.S. 995, and *Sam Andrews' Sons v. Mitchell,* 457 F.2d 745 (9th Cir. 1972). In the instant case, the District of Columbia Court of Appeals set up a classification system for lawful permanent resident aliens. It first divided lawful permanent resident aliens into commuters and non-commuters and then further divided the commuters into two subclasses—seasonal and daily. It then held that the seasonal commuter could not be classified as a returning resident alien within the meaning of 8 U.S.C. 1101(a)(27)(B), and, consequently, could not take advantage of the informal documentary waiver provisions of 8 U.S.C. 1181(b) and 8 C.F.R. 211.1(b)(1).

The Court further held that a seasonal commuter was a nonimmigrant under 8 U.S.C. 1101(a)(15)(H)(ii) of the Act. With this classification, a seasonal commuter could gain entrance into the United States only by obtaining an immigrant visa, which requires the obtaining of a labor clearance certificate from the Department of Labor under 8 U.S.C. 1182(a)(14) or

a temporary H-2 visa under 8 U.S.C. 1101(a)(15)(H)(ii). The two latter visas are impossible to obtain because they demand, as a prerequisite, a certification by the Secretary of Labor that a sufficient number of persons cannot be found in the United States to perform agricultural work. The Secretary of Labor, in his own regulations, has stated that he will not make such a certification. 29 C.F.R. 50.7, Schedule B. Thus, the effect of the decision of the Court of Appeals in the District of Columbia will be to force the seasonal commuter to choose between two alternatives—move his family into the United States, or, give up his permanent residence. As a result, the farmers of the State of California are faced with the possibility that a majority of their work force will be lost if the seasonal commuter aliens lose their permanent resident status and their legal right to work.

Under the same set of facts, the Court of Appeals for the Ninth Circuit in *Gooch v. Clark, supra,* reached an opposite decision. That Court held that any alien lawfully admitted for permanent residence, and employed in the United States, but who had a home in Mexico or Canada, could enter the United States on a daily or seasonal basis to work and still be classified as a returning resident alien within the meaning of 8 U.S.C. 1101(a)(27)B). Therefore, whether or not the alien had a home in Mexico or Canada was not a factor to be considered in allowing him the use of the informal documentary waiver provisions of 8 U.S.C. 1181(b) and 8 C.F.R. 211.1(b)(1). It upheld the policy of permitting aliens legally admitted for permanent residence to gain admission into the United States by presenting the Form I-151 as an entry document.

The difference in effect between these two decisions on agriculture in California, Arizona, New Mexico and Texas cannot be overemphasized. The decision in the instant case will deny admission to the United States to lawful permanent resident aliens who are returning to employment after visiting their families in Mexico or Canada. The sustaining of the *Gooch* decision by this Court would allow the present practice to continue and would prevent these workers from losing their jobs in the United States and California agriculture from losing its main source of employees.

II.

There is a further conflict between the Courts of Appeals for the District of Columbia and for the Ninth Circuit on the issue of whether or not lawful permanent resident aliens can be classified as commuters or non-commuters for the purpose of enforcement of the Immigration Act.

The Court of Appeals for the District of Columbia, petitioner, and respondent have taken the position that lawful permanent resident aliens can be placed into three categories—non-commuter aliens, seasonal commuter aliens and daily commuter aliens.

1. Petitioner and the District Court for the District of Columbia have taken the position that the benefits of the documentary waiver provisions of 8 U.S.C. 1181(b) and 8 C.F.R. 211.1(b)(1) should be made available to all three classes of lawful permanent residents. However, they both have taken the position that the last sentence of 8 C.F.R. 211.1(b)(1), *i.e.*, the labor dispute provision, can be lawfully imposed on daily commuter aliens.

2. Respondent's position has been that no commuter aliens could have the benefit of the documentary waiver provisions of 8 U.S.C. 1181(b) and 8 C.F.R. 211.1(b)(1) and all such aliens can be prevented from entering the United States pursuant to the provisions of the last sentence of 8 C.F.R. 211.1(b)(1).

3. The Court of Appeals for the District of Columbia anchored its decision in the aforementioned three-part definition of lawful permanent resident alien. It held that the documentary waiver provisions of 8 U.S.C. 1181(b) and 8 C.F.R. 211.1(b)(1) cannot be used by seasonal commuters, but could be used by all other lawful permanent residents. It did not consider the issue of the proper application of the provisions of the last sentence of 8 C.F.R. 211.1(b)(1).

In *San Andrews' Sons v. Mitchell, supra,* the Court of Appeals for the Ninth Circuit disagreed with all three positions. It held that the labor dispute provision of 8 C.F.R. 211.1(b)(1), *i.e.*, its last sentence, was invalid because the Service was not entitled to classify lawful permanent resident aliens into commuters and non-commuters for purposes of the enforcement of the Immigration Act.

It further held that the distinction between commuter and non-commuter aliens was neither rationally related to the administration of the Immigration Act, 457 F.2d at 748, nor was constitutional, 457 F.2d at 749.

The sustaining of the decision of the Ninth Circuit in *Sam Andrews' Sons v. Mitchell, supra,* as against the decision of the Court of Appeals of the District of Columbia in the instant case, would have three results. First, all lawful permanent resident aliens who are em-

ployed in the United States could be classified as "returning resident aliens" within the meaning of 8 U.S.C. 1101(a)(27)(B), and, therefore, qualify for the documentary waiver provisions of 8 U.S.C. 1181(b). Second, the Immigration and Naturalization Service could no longer categorize lawful permanent resident aliens who had not moved their families to the United States as "commuters" and enact discriminatory regulations such as the labor dispute provision, *i.e.*, the last sentence of 8 C.F.R. 211.1(b)(1). Finally, organizations, such as those represented by respondents, could not pressure the Immigration and Naturalization Service into discriminating between lawful permanent residents when such discrimination might be to their advantage.

Conclusion.

The conflict between the decision of the Courts of Appeals of the District of Columbia and of the Ninth Circuit has created chaos and uncertainty as to the status of aliens lawfully admitted for permanent residence. This conflict can only be resolved by a decision of United States Supreme Court. The petition for writ of certiorari should be granted.

Respectfully submitted,

RONALD H. BONAPARTE,
LEON L. GORDON,
WILLIAM S. MARRS,
MILTON C. GELENIAN,
By RONALD H. BONAPARTE,
Amici Curiae.

APPENDIX I.

The calculation that there are approximately 150,000 seasonal commuters working in the California agricultural economy was based upon an extrapolation of a survey. The 1971 total of 210,000 persons employed in California agriculture was the last figure available. Four representative farms were picked out in different areas of the state for an examination of their work force to see the number of seasonal commuters that they had in 1971. These figures, in turn, were used to calculate percentages for the entire state. The actual farms involved and the calculations are set forth on the following page.

Crop and Location	Total Employees	Aliens		Seasonal Commuters Who Work 6 Months or More in U.S. Each Year		Admission for LPR Prior to 1964	
		Number	Percentage	Number	Percentage	Number	Percentage
Lettuce and Melons Imperial Valley and Kern Cty.	490*	298	60.82%	Unknown		Unknown	
Strawberries Pajaro Valley Santa Cruz County	129*	119	92.24%	119	100.00%	44	36.97%
Wine Grapes Napa County	119	107	89.91%	105	98.13%	43	40.18%
Deciduous Fruits Butte County	49	48	97.96%	47	97.90%	17	35.41%
	787	572	72.70%	271**	98.81%	104**	37.96%
TOTAL WORK FORCE	210,200***	152,815****					

*Includes harvest workers.
**Figured on basis of last three crops.
***Rural Manpower Report, HRD.
****Extrapolated.